77-673

Supreme Court, U. S.
FILED
NOV 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. ————

WARREN QUADE, an individual, and LYLE QUADE, an individual, doing business as NORTHWEST TRUCK RENTALS, a Division of L&W QUADE, INC., a Minnesota Corporation, and AMBER TRANSFER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

THOMSON, NORDBY & PETERSON
Suite 1530 - 55 East Fifth St.
Saint Paul, MN 55101
(612) 227-0856
Counsel for Petitioners

1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	6
Appendix—Opinion of the Eighth Circuit	A-1

TABLE OF AUTHORITIES

Statutes:

18 USC §401(3)	2, 3, 4
28 USC §1254(1)	2
29 USC §216(a)	2, 4
49 USC §322(a)	2, 3, 4, 5

Cases:

Mitchell v. Fiore, 470 F. 2d 1149 (3rd Cir. 1972), cert. den. 411 U.S. 938	4, 5
United States v. Fidanian, 465 F. 2d 755 (5th Cir. 1972), cert. den. 409 U.S. 1044	4, 5
United States v. B & W Sportswear, 53 F. Supp. 785 (E.D.N.Y. 1943)	5
United States v. P & W Coat Co., 52 F. Supp. 792 (E.D.N.Y. 1943)	5

IN THE

Supreme Court of the United States

October Term 1977

No. ————

WARREN QUADE, an individual, and LYLE QUADE, an individual, doing business as NORTHWEST TRUCK RENTALS, a Division of L&W QUADE, INC., a Minnesota Corporation, and AMBER TRANSFER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

The petitioners, Warren and Lyle Quade, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for The Eighth Circuit entered in this proceeding on October 12, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 12, 1977, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Whether a person enjoined against violating 49 USC §322(a), (which regulates hauling in interstate commerce, and provides for punishment only by fine), who is convicted of contempt for violating that injunction, may be sentenced to person under 18 USC §401(3), (which forbids contempt ~~and~~ allows punishment by imprisonment)?

STATUTORY PROVISIONS INVOLVED

18 USC §401(3)

A court of the United States shall have power to punish by fine or imprisonment at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

29 USC §216(a)

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

49 USC §322(a)

(a) Any person knowingly and willfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not less than $100 nor more than $500 for the first offense and not less than $200 nor more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

STATEMENT OF THE CASE

Petitioners Warren Quade and Lyle Quade were convicted of contempt under 18 USC §401(3), for violating the terms of a consent decree which enjoined them and their trucking company from violating 49 USC §322(a) by hauling for hire in interstate commerce. Their defense was, as to one group of counts, that they leased their trucks to others and thus did not engage in hauling for hire; and as to the other counts, that they believed the commodity hauled was exempt from Interstate Commerce Commission regulation, (it was a feed supplement containing kelp, which is an exempt commodity).

Each was convicted on several counts. The trial court sentenced each to a term of two years in prison, with four

months to be served and the balance suspended. Petitioners objected unsuccessfully to imposition of prison sentences on the ground that 49 USC §322(a) (which they had been enjoined from violating) permits punishment only by fine and that therefore they could not be imprisoned simply because the charges were brought under the contempt provision of 18 USC §401(3).

On appeal the Eighth Circuit affirmed the convictions and let stand the prison sentences, following two circuit court decisions and rejecting two district court decisions holding that only fines could be properly imposed in these circumstances.

REASONS FOR GRANTING THE WRIT

WHEN A PERSON IS ENJOINED FROM VIOLATING A STATUTE WHICH PROVIDES FOR PUNISHMENT BY FINE ONLY, AND HE IS CONVICTED OF CONTEMPT FOR VIOLATING THAT INJUNCTION, HE SHOULD NOT BE SUBJECT TO IMPRISONMENT UNDER THE CONTEMPT STATUTE. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE THIS ISSUE AND RESOLVE THE CONFLICT IN THE REPORTED DECISIONS.

The Eighth Circuit Court in the present case followed the decisions in *United States v. Fidanian*, 465 F. 2d 755 (5th Cir. 1972), cert. den. 409 U.S. 1044, and *Mitchell v. Fiore*, 470 F. 2d 1149 (3rd Cir. 1972), cert. den. 411 U.S. 938, both of which upheld prison sentences imposed for contempt arising from violations of injunctions requiring compliance with the Fair Labor Standards Act (F.L.S.A.), 29 USC §216(a). The F.L.S.A. did not permit imprisonment for first violations, but the *Fidanian* and

Mitchell courts held this was no limitation on the court's power to punish contempt by imprisonment. *Fidanian* was unanimous, but in *Mitchell* Judge Aldisert dissented, arguing that the majority "in zealous haste to protect the contempt power", created a conflict between the contempt power and the F.L.S.A. which would be avoided by limiting punishment in the circumstances to a fine. 470 F. 2d at 1155-1158.

Petitioners respectfully submit that Judge Aldisert's reasoning is correct and preferable because it vindicates the apparent Congressional intent, avoids inconsistency between different laws, and precludes the unfairness of leaving the harsh possibility of imprisonment solely in the prosecutor's discretion in such situations. District Judges Galston and Abruzzo took this position in *United States v. P & W Coat Co.*, 52 F. Supp. 792 (E.D.N.Y. 1943), and *United States v. B & W Sportswear*, 53 F. Supp. 785 (E.D.N.Y. 1943), both of which also involved contempts for violations of injunctions under the F.L.S.A. In both cases the violations were flagrant; nevertheless both courts saw the prosecutor's attempts to obtain prison sentences for contempt as efforts to "circumvent the intention of Congress." 52 F. Supp. at 795, 53 F. Supp. at 787.

The present case is distinguished from all of the foregoing primarily because the underlying statute here is 49 USC §322(a) rather than the F.L.S.A. It should be noted that whereas the F.L.S.A. provides for a fine of $10,000 on each offense and also a prison sentence of six months for second and subsequent convictions, §322(a) does not provide for any prison sentence at all, but merely increases the minimum fine from $100 to $200 for subsequent offenses, the maximum fine being $500 per offense. Clearly,

then, Congress saw violation of the F.L.S.A. as far more serious than the violations here, and thus the departure from Congressional intent is more obvious in the present case.

We scarcely need emphasize the importance of an issue involving the rudimentary power to imprison upon which the lower courts are not in agreement. We realize, of course, that three circuit courts have rejected our position, but we believe this to be a rare case where the reasoning and conclusions of the district judges and the dissenting circuit judge are sounder. In any event, the question is of an importance to deserve this Court's attention.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

JACK S. NORDBY
THOMSON, NORDBY & PETERSON
Suite 1530—55 East Fifth Street
Saint Paul, MN 55101
(612) 227-0856
Counsel for Petitioners

Dated: November 7, 1977.

APPENDIX

(Opinion of the Eighth Circuit)

United States of America,

Appellee,

vs.

Warren Quade, an individual, and Lyle Quade, an individual, doing business as Northwest Truck Rentals, a Division of L & W Quade, Inc., a Minnesota corporation, and Amber Transfer,

Appellants.

Appeal from the United States District Court for the District of Minnesota

Nos. 77-1150 and 77-1155

Submitted: August 30, 1977

Filed: October 12, 1977

Before BRIGHT, ROSS and HENLEY, Circuit Judges.

ROSS, Circuit Judge.

Warren Quade and Lyle Quade were charged with 28 counts of contempt of court under 18 U.S.C. §401(3). In each count they were charged with hauling nonexempt commodities interstate, without having the appropriate ICC authority, and in willfull disbedience of a prior order for consent judgment.

Warren Quade was found guilty of counts 11-28 and acquitted of counts 1-10. Lyle Quade was found guilty of counts 7-28 and acquitted of counts 1-6. The trial court sentenced each defendant to two years imprisonment. He provided that the defendants should each serve four months in prison, that the balance of their terms be suspended and the defendants placed on probation for the remainder of their terms. From judgment entered on the convictions, both Quades appeal. We affirm.

On this appeal the defendants raise three questions: 1) sufficiency of the evidence to establish the requisite intent; 2) alleged error by the trial court in allowing the entire earlier order and injunction into evidence, including that portion describing their prior violations resulting in the injunction; 3) alleged error in the imposition of sentences of imprisonment. We find these errors to be without merit and discuss them seriatim.

I. Sufficiency of Evidence

The first ten counts alleged that the Quades hauled frozen meat interstate and the last eighteen counts alleged that they hauled feed supplements from Oxnard, California to various destinations. As to the first ten counts there was no question that the trips took place, but the Quades contended that the trucks were leased to the shipper, Weinstein International. Also Warren Quade testified that he had not been involved in the Weinstein transaction and was acquitted on all those counts. Lyle Quade was acquitted on counts 1-6 but convicted on counts 7-10.

We have carefully examined the transcript of testimony and viewing the evidence, and the inferences naturally

flowing therefrom, in the light most favorable to the government, we cannot say that the evidence was insufficient to convict Lyle Quade on counts 7-10. Only one trip lease was offered in evidence between Weinstein and the Northwest Truck Rentals but Weinstein's traffic controller testified that he and the Quades had agreed that there would be a lease for each Weinstein shipment. David Quade, a brother, testified that he made lease agreements with Weinstein for each trip in the same form as the one introduced in evidence, but did not produce them.

The government presented testimony that Lyle Quade had told a government investigator, Mr. Jones, that his company had provided the drivers for these Weinstein trips. This was admitted in a statement to an ICC investigator but was later denied by Lyle Quade. The government also points out that there was no specific evidence of a lease as to counts 7-10 which may account for the conviction of Lyle on those counts but not on counts 1-6.

It was shown that Lyle Quade posted bond for a Northwest Truck Rental driver arrested in Iowa on one of the Weinstein trips and that no lease was shown to the Iowa magistrate at the time of the arrest. There were other statements of the government's witnesses which were contradicted by the Quades.

In our view there was enough direct and circumstantial evidence, taking the view most favorable to the government, to permit the jury to convict Lyle Quade on counts 7, 8, 9 and 10. *Compare United States v. Oliver,* 525 F. 2d 731, 739 (8th Cir. 1975), and cases cited therein.[1]

[1]The truck lease, defendant's exhibit 1, was dated July 30, 1971, and continued for 25 days "and thereafter until either party shall have terminated the same by written notice * * *." The first six counts related to hauling meat within that 25 day period and the last four counts involved transactions substantially later in time.

As to the remaining counts the product hauled was a feed supplement which contained kelp, together with other ingredients. Kelp is an exempt product, but the product hauled, SeaQuestraMin (SQM) contained additives and did not qualify for the kelp exemption under ICC regulations. Again, the only question was whether the Quades knew that SQM was not an exempt commodity.

The bags of SQM were labeled to show the contents and clearly indicated the proportion of additives. The Quades, therefore, were on notice that the product was not exempt from ICC permit requirements. The Quades claimed that they thought they were hauling kelp, and that kelp was shown in a "Guide Bulletin" as an exempt commodity. However, this same bulletin, on its title page, explained that exempt products were no longer exempt upon the addition of certain percentages of other ingredients. Warren Quade testified that he had not read this page. Again, while the evidence was conflicting, there was sufficient direct and circumstantial evidence, viewed in the light most favorable to the government, to justify a determination by the jury that the defendants willfully hauled a nonexempt product.

II. Admission of Prior Injunction into Evidence

The defendants claim that it was reversible error for the court to introduce the entire prior injunction into evidence rather than just the paragraph which ordered the defendants to cease hauling nonexempt products in interstate

The lease provided that Weinstein's employees would drive the truck. The Quades provided two part-time employees to Weinstein for this purpose. Weinstein paid them for their services as his employees. After the 10 trips were completed the two drivers returned to the status of "occasional employees" or "casual labor" for the defendants.

commerce without a certificate of authority. The paragraphs to which they object are the introductory paragraph, paragraph II, the first sentence of paragraph IV and the paragraph introductory to the order.[2] They do not claim error as to the introduction of the operative paragraph of the injunction.

These paragraphs add little to the case of the government and serve merely to identify the general nature of the charges which had been the subject of the consent decree. They were not admitted into evidence until the end

[2]These paragraphs are as follows:

> This matter, having come before the Court, upon the verified complaint of Plaintiff, Interstate Commerce Commission, alleging that the individual defendants, Warren Quade and Lyle Quade, and each of them, are engaging in or about to engage in acts or practices which constitute violations of Title 49, United States Code, Chapter 8, Sections 303(c), 320(d), and 322(b)(1), and the complaint further alleging:
>
> II
>
> That from July 25, 1966, up to and including the date of filing said complaint, Warren Quade, an individual, and Lyle Quade, an individual, and each of them, defendants, have been and are engaging in the for-hire transportation business, transporting property by motor vehicle, in interstate commerce, upon public highways, as set forth in Appendix "A" of Plaintiff's verified complaint, without there being in force with respect to said defendants, or either of them, a certificate or permit issued by the Interstate Commerce Commission authorizing such transportation, and that said motor carrier operations conducted by said defendants, and each of them, were and are violations of Title 49, United States Code, Section 303(c) and thus subject to be enjoined by this Court upon direct application of Plaintiff herein, pursuant to Title 49, United States Code, Section 322(b)(1).
>
> IV
>
> That unless restrained by this Court, the activities described in paragraphs II and III hereof engaged in by said defendants, Warren Quade, an individual, and Lyle Quade, an individual, and each of them, will continue in a manner and form aforesaid or otherwise.
>
> • • •
>
> The individual defendants, Warren Quade, and Lyle Quade, and each of them, being represented by counsel, having consented hereto and admitting the allegations set forth in the complaint therein, it is hereby
>
> • • •

of the trial, and were not read to the jury, but the entire injunction was sent into the jury room with the other exhibits.

In our opinion all of the consent decree was admissible as background for the government's case and the portions thereof objected to serve principally to identify the general nature of the charges which had been the subject of the decree.

As to the objections that portions of the decree bring into the record, evidence of other crimes, it must be noted that FED. R. CRIM. P. 404(b) provides that evidence of other crimes or wrongs is admissible for the purpose of proving "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Rule 403 permits the trial judge to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury * * * ."

The entire defense of the defendants as to counts 11-28 was based on their lack of knowledge that SQM was a nonexempt product and that there was no intent to violate the terms of the order. The injunction referred to past violations of the defendants by engaging in the "for-hire transportation business, * * * in interstate commerce, * * * without * * * a certificate or permit issued by the Interstate Commerce Commission authorizing such transportation, * * * ." We think it clear that evidence of past violations had probative value on the issues of intent, knowledge and absence of mistake or accident, and we are convinced that the danger of unfair prejudice did not outweigh the probative value of the challenged evidence.

Finally, in this connection we observe that counsel for

the Quades asked the trial court for an instruction limiting the purpose for which the prior injunction was received. The court first read only the operative portion of the injunction, to which there was no objection, and later gave a cautionary instruction as follows:

> Have in mind also that the charges before you, the charges that you are deciding, are those that are alleged to have occurred on and after July 30, 1971, and you need not concern yourselves with any references or evidence, if any there be, with reference to so-called violations that occurred before that date.

Near the end of the trial the portions of the decree to which objection was made came into the record with the entire injunction which was sent to the jury room with other exhibits. The portions offensive to the Quades were never read to the jury although in closing argument some references to past violation seem to have been made by government counsel. On the record as a whole, including the cautionary instruction, we find that the defendants received a fair trial in all respects, and we find no reversible error in the admission of any portion of the injunction.

III. Alleged Error in Imposing Sentences

The defendants claim that although they were convicted of violation of the contempt statute, 18 U.S.C. §401(3), which sets no limits for fine or imprisonment, the sentences should have been limited to fines as provided in 49 U.S.C. §322(a), the statute the Quades had been enjoined from violating. Although there is some authority for this position, *United States v. P & W Coat Co.*, 52 F. Supp. 792 (E.D.N.Y. 1943), we choose to follow the

rationale of two circuits which have upheld a sentence of imprisonment under similar circumstances. Both the Third Circuit and the Fifth Circuit have declined to require sentencing under the substantive violation statute and have upheld sentencing solely under 18 U.S.C. §401(3). In *Mitchell v. Fiore,* 470 F. 2d 1149 (3d Cir. 1972), *cert. denied,* 411 U.S. 938 (1973), the court agreed with the rationale of *United States v. Fidanian,* 465 F. 2d 755 (5th Cir.), *cert. denied,* 409 U.S. 1044 (1972), and paraphrased the *Fidanian* holding as follows:

> According to defendant, to permit his imprisonment under 18 U.S.C. §401(3) (1970) for violating the injunction would subvert the scheme of section 216 (a) and rob him of constitutional rights. This line of argument has been accepted by some courts, but it was squarely rejected in the recent case of United States v. Fidanian, 465 F. 2d 755 (5th Cir. 1972). There the court reasoned, first, that such a limitation on the power of the federal courts to punish violations of their own orders—which orders, we note, were expressly authorized in section 217—should be explicit. Second, punishment for criminal contempt does not reach the first offenders whom Congress intended to shield in section 216(a); rather, it affects only these who have already experienced a judicial proceeding under the Act, namely, the proceeding when the injunction was issued.

Mitchell v. Fiore, supra, 470 F. 2d at 1154 (footnotes omitted).

In this case both Quades were being punished for violating the court's earlier order by transporting for hire

without authority, rather than for the substantive offense itself. We conclude, therefore, that the sentence was legally permissible.

The judgments of conviction are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.